THONG HON FAH

v.

VIKNESWARAN THANAPALAN

HIGH COURT MALAYA, SHAH ALAM
MOHD HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: MT1-12-146-2000]
9 FEBRUARY 2004
(24 AUGUST 2001)

TORT: *Negligence - Road accident - Contributory negligence - Plaintiff knocked down by defendant motorcyclist while crossing main road at three-way junction - Whether plaintiff contributed to accident - Whether trial judge erred in fact - Whether reduction of award excessive - Whether quantum of award should be increased*

ROAD TRAFFIC: *Negligence - Road accident - Plaintiff knocked down by defendant motorcyclist while crossing main road at three-way junction - Whether plaintiff contributed to accident - Whether trial judge erred in fact - Whether reduction of award excessive - Whether quantum of award should be increased*

CIVIL PROCEDURE: *Documents - Bundle of documents - Sketch plan contained in agreed bundle of documents - Whether trial judge erred in accepting content of sketch plan as evidence - Whether plaintiff only made limited admissions as to content of sketch plan*

DAMAGES: *Quantum - Leg injury - Fracture of left femur - Whether quantum of award should be increased*

This was an appeal by the plaintiff against the decision of the learned sessions court judge ('SCJ'). The SCJ, in finding the defendant liable in negligence and awarding the plaintiff damages, also made a finding that the plaintiff was guilty of contributory negligence and accordingly reduced the award by 50%. The plaintiff appealed against the finding of contributory negligence as well as the quantum of RM30,000 awarded for the injury to the plaintiff's left leg. The accident occurred when the plaintiff was crossing a road at a three-way junction while pushing his motorcycle. While crossing, the plaintiff was knocked down by a motorcycle driven by the defendant just as he was about to complete the crossing by stepping onto the grass verge at the other side of the road. As a consequence, he suffered a serious injury to his left leg. The plaintiff averred that he had looked to his left before crossing the road but did not see any

approaching vehicle. He also insisted that at the time of the accident, there was no double line traffic sign along the road. In ruling that there was contributory negligence, the SCJ opined that it was wrong for the plaintiff to have crossed the road when there was a double line traffic sign.

Held:

[1] The SCJ erred in making a finding of fact that there was a double line traffic sign at the point where the plaintiff crossed. Although the sketch plan showed that there was a double line traffic sign, the SCJ, nonetheless, should not have accepted that as evidence of the presence of such a traffic sign because the sketch plan was contained in a bundle of documents marked merely as "Agreed Bundle of Documents". There was no agreement between the parties that they agreed to the contents of the documents as well. This meant that the parties only agreed to dispense with the calling of the makers of the documents, not the contents of the documents. (p 419 e-g)

[1a] Even though the plaintiff had referred to the sketch plan and had indicated on it by means of broken lines the point along the road where he had crossed and by marking "X" on the point where he had been knocked down by the defendant's motorcycle, the plaintiff did not say he agreed with the rest of the content of the sketch plan. On the contrary, the plaintiff had said in evidence that at the time of the incident there was no double line traffic sign on the road. Therefore, such markings as made by the plaintiff on the sketch plan were only limited admissions by the plaintiff as to the content of the sketch plan and could not be interpreted as amounting to agreeing to the whole content of the sketch plan. (p 420 f-g)

[2] Even assuming that there was a double line traffic sign, it was not unlawful for the plaintiff to have crossed the road. Under the Road Traffic Rules 1959, such a traffic sign, in law, does not prohibit a pedestrian, such as the plaintiff, from crossing the road. Therefore, the presence or absence of the double line traffic sign was irrelevant for the purpose of determining whether or not the plaintiff was guilty of contributory negligence. (pp 420 h & 421 a)

[3] The plaintiff was, nevertheless, guilty of contributory negligence as his evidence that he did not see the presence of the motorcycle was an implied admission on his part that he did not keep a proper lookout for approaching vehicles before crossing the road. This was a breach of art. 75 of the Highway Code. It was not sufficient for the plaintiff to have

looked only to the left; he should have also looked to the right and to the back since there was a three-way junction at the point of crossing. However, the reduction by 50% of the award was excessive, particularly, bearing in mind that the collision occurred near the grass verge on the other side of the road. At most, the award should only be reduced by 35%. (p 421 b & f-h)

[4] By referring to the recently decided case of *Chu Kim Sing & Anor v. Abdul Razak Amin*, the quantum for the fracture of the left femur (left leg) should be increased to RM40,000 since the injury in the present case was far more serious than the injury in *Chu Kim Sing (supra)*. (p 422 a-b & h

[Appeal allowed.]

Case(s) referred to:

Balakrishnan Kunjamboo v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(refd)***

Chu Kim Sing & Anor v. Abdul Razak Amin [1999] 4 CLJ 448 ***(foll)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 FC ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 12(1)
Highway Code, art. 75
Road Transport Act 1987, s. 68(3)

For the appellant/plaintiff - Nelson Cherian; M/s Shahriza, Varegheese & Chandaran
For the respondent/defendant - Vincent Chow; M/s Ooi Aik Lim & Assocs

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:

This is an appeal by the appellant/plaintiff against the decision of the learned Sessions Court Judge, Shah Alam. In her decision of 4 May 2000, the learned Sessions Court Judge gave judgment for the plaintiff. The learned Sessions Court Judge found the respondent/defendant liable in negligence and awarded the plaintiff damages. However, she also made a finding that the plaintiff was guilty of contributory negligence and, accordingly, she reduced the award by 50%.

The appeal by the plaintiff is against the finding of contributory negligence as well as on quantum.

On quantum, the appeal by the plaintiff is against the award of RM30,000 for injury to the plaintiff's left leg.

I have allowed the appeal both on contributory negligence and on quantum.

In respect of the appeal on contributory negligence, the learned Sessions Court Judge was right when she made a finding of contributory negligence on the part of the plaintiff. However, I am of the view that the learned Sessions Court Judge erred when she reduced the amount of the award by 50% by reason of contributory negligence. In my opinion, the reduction was excessive. To my mind, at the most the award should only be reduced by 35%.

In respect of the appeal on quantum, I increased the award of damages for the injury to the left leg from RM30,000 to RM40,000.

It is necessary to point out at the outset that at the commencement of the trial the parties tendered, *inter alia*, a common bundle of documents (exh. B) marked "Agreed Bundle of Documents" (Ikatan Dokumen Dipersetujui). This bundle contains, *inter alia*, a sketch plan of the scene of accident. Neither party called the maker of this sketch plan at the trial to be cross-examined as to the content of the document.

The trial before the Sessions Court was brief. For the plaintiff, only the plaintiff/complainant himself gave evidence. The defendant was absent. No other witness was called to give evidence on behalf of the defence.

Now, I proceed to the brief facts. On 26 March 1996, at about 7 in the morning, the plaintiff was crossing a road pushing a motorcycle. It was at a "T" (three-way) junction, but the plaintiff was crossing the main road. The crossing was not at a pedestrian crossing. There was no pedestrian crossing within the vicinity. While crossing, the plaintiff was knocked down by a motorcycle driven by the defendant. This happened when the plaintiff was about to step onto the grass verge at the other side of the road (in other words, as he almost completed the crossing). As a consequence, he suffered a serious injury to his left leg.

According to the plaintiff, he did look to his left before crossing the road but he did not see any approaching vehicle. He said that the first time he saw the defendant's motorcycle was when he almost reached the grass verge on the other side. The plaintiff did not say from which direction the motorcycle came.

The plaintiff, in cross-examination, insisted that at the time of the accident, there was no double line (ie, two continuous lines) traffic sign along the road.

As, I have said earlier, the defence elected not to offer any oral evidence.

In ruling that there was contributory negligence, the learned Sessions Court Judge opined that it was wrong for the plaintiff to have crossed the road when there was a double line traffic sign. In her grounds of judgment she said:

> Mengikut rajah kasar yang telah di persetujui kedua-dua pihak, jalan tersebut mempunyai garis berkembar di tengah-tengah. Ini bermakna plaintif tidak sepatutnya menyeberangi jalan tersebut kerana terdapat garis berkembar tersebut. Kemalangan berlaku pada pukul 7.00 pagi.
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> Walaupun defendan tidak memberi keterangan, Mahkamah dapat menganggarkan bahawa kemungkinan besar defendan telah menunggang motorsikalnya dengan laju. Kerana jika di lihat dari tempat pertembungan 'X' (yang tidak dicabar oleh peguam defendan), kemalangan berlaku berhampiran tepi jalan. Ini bermakna, jika defendan memberi perhatian sewajarnya dan menunggang motorsikal degan perlahan pasti beliau dapat melihat akan kehadiran plaintif yang sedang melintas dan menolak motorsikalnya. Oleh itu ada kemungkinan besar plaintiff juga cuai dalam kes ini.
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> Berdasarkan atas sebab-sebab di atas Mahkamah memutuskan bahawa plaintiff bertanggungan 50% dan defendan bertanggungan 50%.

In my judgment, I agree that the plaintiff was guilty of contributory negligence; but not for the reason as given by the learned Sessions Court Judge. My reason for so holding is different. In my view there is nothing wrong in law for the plaintiff to cross the road pushing his motorcycle. With respect, the learned Sessions Court Judge erred in making a finding of fact that there was a double line traffic sign at the point where the plaintiff crossed. Although the sketch plan shows that there was a double line traffic sign, the learned Sessions Court Judge, nonetheless, should not have accepted that as evidence of the presence of such a traffic sign. This is because, as pointed out earlier in this judgment, the sketch plan is contained in a bundle of documents marked merely as "Agreed Bundle of Documents". There was no agreement of the parties that the parties agreed to the contents of the documents as well. This means that parties only agreed to dispense with the calling of the makers of the documents but, as to the contents, parties are not in agreement. The principle regarding the meaning of a bundle of documents marked merely as "Agreed Bundle of Documents" is clearly laid down in by the Federal Court in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509. In this case, Peh Swee Chin FCJ in delivering the decision of the Federal Court said (at p. 521) said:

a First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly
b or indirectly and such truth of such contents is liable to be challenged in court at the insistence of either of the parties.

Thirdly, such documents therein do not form automatically a part of the case in question *ipso facto*, but any of such documents does not become part of such evidence if it is read or referred to by either of parties, wholly or partly,
c at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of
d the documents is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any "written hearsay" contained therein. The court may refuse to give any weight at all to any document, but
e then it is accountable like, in other matters, to the parties and to the appellate for the reason for such refusal.

It is, however, true that in his evidence the plaintiff had referred to the sketch plan and had indicated on it by means of broken lines the point along the road
f where he had crossed; and by marking "X" on the sketch plan the point where he was knocked down by defendant's motorcycle. But apart from this, the plaintiff did not say he agreed with the rest of the content of the sketch plan. On the contrary, it is to be recalled that the plaintiff had said in evidence that at the time of the incident there was no double line traffic sign on the road. Therefore, such markings as made by the plaintiff on the sketch plan are only
g limited admissions by the plaintiff as to the content of the sketch plan. They cannot be interpreted as amounting to agreeing to the whole content of the sketch plan.

Even assuming that I am wrong in making a finding that there was no double
h line sign on the road, in other words, there was in fact a double line traffic sign, still, it was not unlawful for the plaintiff to have crossed the road. Under the Road Traffic Rules 1959, such a traffic sign only prohibits a vehicle overtaking another vehicle, or making a turning to the left or right involving cutting the double lines, or making a U-turn. But in law such a traffic sign
i does not prohibit a pedestrian, such as the plaintiff, from crossing the road.

Therefore, the presence or absence of the double line traffic sign is irrelevant for the purpose of determining whether or not the plaintiff was guilty of contributory negligence.

However, be that as it may, in my judgment, the plaintiff is, nevertheless, guilty of contributory negligence. His evidence that he did not see the presence of any motorcycle is an implied admission on his part that he did not keep a proper lookout for approaching vehicles before crossing the road. By not keeping a proper look out, the plaintiff had breached the Highway Code. Article 75 of the Highway Code teaches us the safe and correct way of crossing a road. It says:

> 75. Teach children to walk safely by seeing that before crossing the road they always do the correct drill, ie, "look right, look left, then look right again, and if the road is clear, quick march". Make a habit of using the same drill yourself.

If he had kept a proper lookout before crossing the road, as prescribed by the Highway Code, he would have noticed the motorcycle; for the motorcycle could not have appeared out of nowhere. Section 68(3) of the Road Transport Act 1987 provides:

> (3) Failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negate any liability which is in question in those proceedings.

The plaintiff said in evidence that he had looked to the left but did not see any vehicle approaching. To my mind it is not sufficient for the plaintiff to have looked only to the left: he should have also looked to the right; and since at the point of crossing there was in fact a three-way junction, he should have also looked to the back because there was another road coming from behind him leading to and joining the main road (ie, the road on which he did the crossing). The defendant's motorcycle could have come from any of these three directions.

However, while there was contributory negligence, nevertheless, I am unable to agree that the award should be reduced by 50% by reason of the contributory negligence. In my judgment, such a reduction is excessive, particularly, bearing in mind that the collision occurred near the grass verge on the other side of the road. At the most, the award should only be reduced by 35%. I think such a reduction is under the circumstances just and equitable (see s. 12(1), Civil Law Act 1956).

For the fracture of the left femur (left leg), the learned Sessions Court Judge, guided by *Balakrishnan s/o Kunjamboo v. Savastine Anthony s/o Francis* [1991] 1 CLJ 503 and *Chu Kim Sing & Anor v. Abdul Razak bin Amin* [1999] 6 MLJ 433, made an award of RM30,000. *Balakrishnan* is a relatively old case decided in 1991 (and the accident took place in 1981) and I think may no longer be helpful. *Chu Kim Sing* is, however, quite recently decided. It was a case of closed comminuted fracture of the midshaft of the left femur of the plaintiff, with wasting of the muscle and a permanent shortening of 1.0 cm. When the injury healed, the comminuted fracture of the left femur united well, the K-nail could be removed and the range of movements of the left hip and left knee joint were full and free. Although there was a permanent limp and residual disability, the expert medical evidence stated that the plaintiff would be able to resume his old job as a construction labourer. The court made an award of RM35,000.

In the present case, the learned counsel for the plaintiff submitted that the award in the present case should be RM45,000 since the injury is more serious than the injury in *Chu Kim Sing*. The extent of injury suffered by the plaintiff is as follows:

(1) compound comminuted fracture of left femur with intercondylar extension;

(2) the fracture had gone into non-union which causes pain and tenderness, and this non-union needs to be further treated with bone grafting;

(3) permanent shortening of 4.0 cm of the femur;

(4) permanent stiff left knee and lateral laxity due to the intra-articular extension of the fracture;

(5) permanent limp, and plaintiff will need crutches to walk;

(6) plaintiff will not be able to squat or cycle;

(7) plaintiff will have difficulties in putting on shoes and trimming toe nails;

(8) the fracture of the left knee will lead to degenerative arthritis of the joint in the future with further pain and stiffness; and

(9) plaintiff will not be able to return to his previous occupation as a guard.

I accept that the injury in the present case is far more serious than the injury in *Chu Kim Sing*. I, therefore, increased the award to RM40,000.